No. 10,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

In support of the decision below appellee argues:

(1) That with regard to the taxes in question, appellant is not the taxpayer but is merely a tax collector.

(2) That recovery by appellant is forbidden by Section 143(f) of the Revenue Act of 1938 and Section 143(f) of the Internal Revenue Code.

(3) That appellant has not established an overpayment of tax that can be recovered.

1. APPELLANT IS THE TAXPAYER.

Appellee argues that a withholding agent who withholds is not a taxpayer but cites no authority which supports such contention. *Houston Street Corp. v. Commissioner* (5 Cir. 1936), 84 F(2d) 821, specifically held that a withholding agent was a taxpayer. *Capital Estates, Inc. v. Commissioner,* 46 BTA 986, apparently recognized the withholding agent as a taxpayer for it is only a taxpayer who is entitled to a hearing before the Board of Tax Appeals. (Internal Revenue Code, Section 272.) *Pauker v. United States* (D.C.N.Y. 1938), 23 F. Supp. 821, held that Section 143(f) prohibited recovery by a withholding agent.

"Taxpayer" is defined by the law as "any person subject to the tax". (Section 901(a)(14), Revenue Act of 1938; Section 3797(a)(14), Internal Revenue Code.) Under Section 143 which provides for and requires withholding, the withholding agent is clearly and definitely made liable for the tax and is the only person who is made liable for the tax. The law does not purport to make the withholding agent liable for a penalty for failure to withhold as would be the case if the withholding agent was merely acting as an agent for the collection of the tax. See Section 143(c), Internal Revenue Code.

The Commissioner of Internal Revenue recognizes a withholding agent as the taxpayer when he assesses a deficiency against him for as stated above there appears to be no authority for such assessment of a deficiency against a withholding agent unless he is the taxpayer. (Section 272, Internal Revenue Code.)

Appellee seems to suggest that a withholding agent is not the taxpayer unless he fails to withhold and the Commissioner asserts a deficiency against him, at which time he becomes the taxpayer. No such distinction is made or justified by the law. The law specifically makes the withholding agent liable for the tax without qualification and without regard to whether he has withheld the amount of the tax.

A similar situation exists in the case of certain other taxes such as the excise tax on club dues. The club is required to collect the taxes from its members and pay them over to the government. In such cases where a club has brought suit to recover the taxes it has been contended by the United States that since the club had not borne the burden of the taxes it was not the taxpayer and was not entitled to recover. The Court of Claims has held that a club which is required to collect and pay the tax is the taxpayer and is entitled to recover any overpayment regardless of the fact that it did not bear the burden of the tax.

Builders Club of Chicago v. United States (Ct. Cls. 1936), 14 F. Supp. 1020;

Alliance Country Club v. United States, 62 Ct. Cl. 579.

The Court of Claims stated that such a club was not a mere collecting agent for the United States. See also *United States v. Johnston*, 268 U.S. 220, 45 S. Ct. 496.

Since the nonresident alien generally bears the burden of such taxes and may pay the tax direct and receive a credit for such taxes, it may be that he may

also be considered the taxpayer with regard to these taxes. It is not unusual for two or more persons to be liable for the payment of a single tax. In such cases all parties liable for the tax are taxpayers.

Regulations 71 (Relating to Stamp Taxes), Section 113.2;

Raybestos-Manhattan Inc. v. United States (1935), 296 U.S. 60, 56 S. Ct. 63;

Standard Oil Co. of California v. United States (9 Cir. 1937), 90 F(2d) 157.

It is submitted that appellant was the person liable for the payment of the taxes in question and was the taxpayer with regard thereto.

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2. SECTION 143(f) DOES NOT FORBID REFUND TO APPELLANT.

Section 322 of the Internal Revenue Code authorizes the refund of any overpayment of tax to the taxpayer, provided certain procedural requirements such as the filing a claim are complied with. Said section makes no requirement with regard to the taxpayer having borne the burden of the tax. Unless there is some other restriction appellant as the taxpayer was entitled under Section 322 to recover the overpayment of taxes.

Appellee contends that Section 143(f) prohibits the refund of the overpayment to appellant. Section 143(f) provides:

> "Refunds and Credits. Where there has been an overpayment of tax under this section any refund or credit made under the provisions of Section 322

shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent."

In the first place it should be noted that Section 143(f) recognizes the withholding agent as the taxpayer for Section 322 authorizes refunds only to taxpayers. Secondly, Section 143(f) does not prohibit the making of a refund to a withholding agent but on the contrary specifically requires that any refund of any overpayment of a tax under Section 143 be made to the withholding agent unless the tax was withheld. The law does not state to whom the refund should be made if the tax was withheld. Since the tax was withheld in this case, Section 143 does not *require* refund to the withholding agent and the person entitled to the refund must be determined from Section 322.

As pointed out above Section 322 authorizes the refund of overpayments to the "taxpayer" and that term at least includes the withholding agent who was made liable for the tax and who paid the tax to the Collector of Internal Revenue.

Builders Club of Chicago v. United States (Ct. Cl. 1936), 14 F. Supp. 1070;

Alliance Country Club v. United States, 62 Ct. Cl. 579.

It is only by a negative inference that appellee reaches the conclusion that Section 143(f) prohibits the refund to a withholding agent who has withheld.

Had Congress intended to prohibit the refund to the withholding agent as appellee contends, it most cer-

tainly would have specifically so provided as it has done in other similar situations such as the Victory Tax (see Section 466(f), Internal Revenue Code, as amended by Revenue Act of 1942), or would have imposed some specific requirement or restrictions as it has done in the case of the Safe Deposit Tax (Section 1854, Internal Revenue Code), the Retailer's Excise Tax (Section 2407(b), Internal Revenue Code), and the Manufacturer's Excise Tax (Section 3443(d), Internal Revenue Code).

The fact that Congress has specifically provided for the refund to or the protection of the persons who bore the burden of a tax in at least four other sections of the law clearly indicates that Congress did not intend to accomplish the same result by inference from Section 143(f). If Congress had intended to restrict refunds to withholding agents it would have specifically so provided in the law. The failure of Congress to include such a restriction in the law in this instance indicates that it had no such intention.

It is submitted that Section 143(f) does not by its terms forbid a refund to a withholding agent who has withheld but merely requires that the refund be made to the withholding agent where the tax has not been withheld. No doubt the purpose of said provision was to protect the rights of persons who were by law made liable for a tax upon income which did not belong to them and from which they received no benefit. In the absence of such provision the Commissioner might make refunds to nonresident aliens and the withholding agent would be required to seek recovery from the

nonresidents in the Courts of foreign lands. If on the other hand a refund was made to a withholding agent who had previously withheld the tax, if the withholding agent did not voluntarily reimburse the person from whom the tax had been withheld such person could recover by action in a proper Court in the United States.

The Commissioner has on other occasions acted in accordance with appellant's interpretation of Section 143(f) and has refunded overpayments of withheld taxes to appellant upon appellant's claim for refund. (R. 39.) In such instances appellant has paid over the recovery to the persons from whom the taxes were withheld. (R. 39.) In the present case appellant has definitely and repeatedly committed itself to immediately pay over to the nonresident aliens any taxes recovered by it in this action, in the same manner it has followed in the case of previous recoveries. (R. 39-40.)

It is respectfully submitted that appellee and the Court below have misinterpreted Section 143(f) and that that section does not forbid the refund of overpayments of taxes under Section 143 to a withholding agent who did withhold the tax.

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3. APPELLANT HAS ESTABLISHED AN OVERPAYMENT WHICH SHOULD BE REFUNDED.

Appellee contends that appellant has not established overpayment of the taxes sought to be recovered in that it has not shown that the individuals from whom

taxes were withheld overpaid their taxes and have not filed claims for refund. Before considering the merits of this contention, appellant desires to point out that such defense is not timely presented. While it is true that the Commissioner or a Collector of Internal Revenue may raise matters not covered by the claim for refund as an affirmative defense such matters must be timely asserted and cannot be raised for the first time in the Appellate Court.

If taxes due from the alien individuals have not been fully paid or if any of them have filed claims for refund, those facts are peculiarly within the knowledge of the appellee, and should have been raised by him in the Court below. While the burden of proof is on the taxpayer seeking a refund of taxes he is not required to anticipate and negative every possible defense.

In this regard the Circuit Court of Appeals for the Sixth Circuit made the following statement in *Routzahn v. Brown,* 95 F(2d) 766, 770:

> "It is said that under the broad language of *Lewis v. Reynolds,* supra, the burden is upon the taxpayer to show that he has overpaid the tax legally due, and if not the government may retain payments already received when they do not exceed the amount which might have been properly assessed. Even so, this cannot mean that the taxpayer must in the first instance anticipate all possible claims of tax liability that may at any time be asserted by the collector, and by allegation and proof negative them all, or fail to make his case. This would place a burden upon a taxpayer seeking to recover an overpayment impossible

ever for him to carry. It is implicit in his claim for refund and his declaration of overpayment in suit, each denying the validity of the only asserted basis for the deficiency, that there is no other tax liability in derogation of his right to recover. He has done all within his power to frame issues to the end that decision will forever end the controversy. Affirmation of other grounds of liability is the responsibility of the defendant, and his also the responsibility if in the first trial all dispute is not terminated. Contemplation of the possibilities presented by present circumstances must demonstrate the point. Assuming that upon retrial the collector had asserted but one of his new defenses, that judgment had followed, reversed upon appeal with mandate for new trial, that upon the third trial the collector had again amended, added another distinct defense, and so on ad infinitum, the taxpayer might thus be prevented from ever recovering an overpayment. This cannot be the law."

See also:

Powell v. United States (9 Cir. 1941), 123 F(2d) 472;

United States v. First Wisconsin Trust Co., et al. (7 Cir. 1937), 92 F(2d) 840.

Appellee has not, at any stage of these proceedings, contended or suggested that the taxes in question were legally due from the alien individuals, that any of said taxes have been refunded or that claims for refund have been filed. As such facts would be clearly within the knowledge of appellee, they should have been presented in the Court below if appellee desires to rely

upon such facts as a defense against the refund claimed. It is to be noted that appellee even now does not state that such facts exist but merely alleges that appellee should have proved that they do not exist. Appellant submits that there is no rule in law or equity which requires a plaintiff to anticipate and negative facts which might constitute a defense of set off or equitable recoupment and particularly is that true when the facts are peculiarly within the knowledge of the appellee and the appellee raises no issue with regard thereto.

Powell v. United States (9 Cir. 1941), 123 F(2d) 472;

United States v. First Wisconsin Trust Co., et al. (7 Cir. 1937), 92 F(2d) 840.

The rule contended for by appellee would make it impossible, as a practical matter, for a withholding agent to ever recover an overpayment of taxes paid under Section 143 of the Internal Revenue Code. A withholding agent would not have access to the facts which appellee contends he must prove in order to establish an overpayment. It is not conceivable that Congress intended to give a withholding agent a right to recover overpayments which it would be impossible for him to prove. In all of the cases cited by appellee in support of his contention in this regard the facts established that the government had an equitable claim to the taxes involved which was barred by the statute of limitations. In the present case appellee has not asserted that he or the United States has any equitable right or claim to the taxes paid by appellant.

Furthermore, in the present case the record shows that the period for filing claims for refund has expired. The returns were filed on March 15, 1939 (R. 35), and March 15, 1940 (R. 37). Under the provisions of Section 322 of the Internal Revenue Code the period for filing claims for refund expired for 1938 on March 15, 1942 and expired for 1939 on March 15, 1943. If any claims have been filed or if any refunds have been paid appellee should disclose such facts and not remain silent and demand that appellant prove the absence of such facts.

It is also to be noted that Section 143(f) specifically refers to overpayments of tax under that section. As Section 143 refers only to taxes withheld at source and requires withholding from certain specified payments on the basis of gross income and without regard to deduction or credits, said subsection (f) must have been intended to apply to excessive withholdings and payments which were not required by law. The fact that the withholding agent is made liable for the tax regardless of whether he actually withholds and the reference in Section 143(f) to overpayments of tax under that section indicate that liability of the aliens for tax on other income is not to be considered in determining whether there has been an overpayment under Section 143. Of course no refund would be made to an alien who owes other taxes whether for the year in question or any other year but it is doubtful that the Commissioner would be justified in refusing refund to a withholding agent who had not withheld because the person on whose income the tax was paid owed a tax for the year in which the income was

tion of the rights of the nonresident aliens who due to circumstances over which they have no control have been deprived of money which rightfully belongs to them. Appellant is convinced that it is entitled under the law to recover said overpayments and that it has a moral if not a legal obligation to take the necessary steps to accomplish said recovery. Appellant is willing to consent to any conditions which might be imposed by the Court to assure the payment or credit of any recovery to the persons ultimately entitled thereto.

Appellant respectfully submits that the judgment of the District Court should be reversed and that judgment should be rendered for appellant.

Dated, San Francisco,
June 18, 1943.

Respectfully submitted,
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